A CENTURY LOST: THE END OF THE ORIGINALISM DEBATE

*Eric J. Segall**

"I happen to like originalist arguments when the weight of the evidence seems to support the constitutional outcomes I favor . . . ."[1]

INTRODUCTION

Almost one hundred years ago, Professor Arthur W. Machen published an article in the *Harvard Law Review* called *The Elasticity of the Constitution.*[2] In this two-part article, which until now has been buried in history,[3] Professor Machen explored the relationship between a fixed Constitution and an ever-changing society and advanced three propositions about originalism and constitutional interpretation. First, judges must attempt to ascertain the original meaning of the Constitution whenever they exercise judicial review.[4] Second, a political practice determined by judges to be constitutional may later be invalidated by judges, and vice-versa, because the facts to which the original principles

* Associate Professor of Law, Georgia State College of the Law. I would like to thank Bill Edmundson, Barry Friedman, Lynn Hogue, Steve Kaminshine, Chuck Marvin, Natsu Saito, Suzanna Sherry, and Patrick Wiseman for helpful comments on an earlier draft. I also owe great appreciation to my research assistant Nancy Greenwood.

1. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* xv n.* (Alfred A. Knopf, 1996) (cited in Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 Fordham L. Rev. 87, 123 (1997)).

2. Arthur W. Machen, *The Elasticity of the Constitution* (pts. 1 & 2), 14 Harv. L. Rev. 200, 273 (1900). This article was placed in two different parts of the volume but was clearly intended to form one unified piece. Professor Machen was a Professor at the University of Chicago where he wrote mostly about corporate law. See Arthur W. Machen, *Corporate Personality*, 24 Harv. L. Rev. 253 (1911). I could only find one other article he wrote on constitutional law. See Arthur W. Machen, *Is the Fifteenth Amendment Void?*, 23 Harv. L. Rev. 169 (1910).

3. A Westlaw search performed on September 20, 1998, revealed only one citation to this article, which simply identified Professor Machen as an originalist. See Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent"*, 15 Harv. J.L. & Pub. Pol. 965, 967 n.6 (1992).

4. See Machen, 14 Harv. L. Rev. at 203 (cited in note 2).

are applied are constantly changing.[5] Third, the Framers might originally have believed that the meaning of vague constitutional provisions, like the Eighth Amendment's ban on "cruel and unusual punishments," would not be fixed as of the date of enactment, but should be fleshed out by judges over time according to the values of succeeding generations.[6]

Professor Machen's article demonstrates that he was what modern scholars refer to as a "sophisticated" originalist.[7] He believed the examination of original meaning is not the search for what the Framers specifically had in mind when they drafted the text, but rather for the general and reasonable meaning of the language they used.[8] Moreover, Professor Machen knew there would be many constitutional questions originalism cannot answer.[9] In such cases, judges must turn to other "rules of construction" and "positive law," which inevitably provide them significant discretion to determine the proper results in difficult cases.[10]

This essay argues that the academic debate over the legitimacy of originalist and non-originalist constitutional interpretation has not progressed materially since Professor Machen's article.[11] Furthermore, a review of his work teaches us that originalism does not lead inevitably to active or passive judicial review; that questions about originalism as an interpretive tool are largely irrelevant to how judges decide real cases; and that there is little reason for scholars to continue to argue about the proper role of original meaning in constitutional interpretation.[12]

---

5. Id. at 273-75.

6. Id. at 283.

7. See David Crump, *How do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 Harv. J.L. & Pub. Pol. 795, 823-28 (1996) (discussing "sophisticated" versions of originalism).

8. See Machen, 14 Harv. L. Rev. at 211-13 (cited in note 2).

9. Id. at 215.

10. See id.

11. For the purposes of this essay, I will define "originalist" constitutional interpretation to mean the belief that the original meaning of the Constitution is an essential component of constitutional analysis, and "non-originalist" constitutional interpretation as the belief that the search for the original meaning is not particularly relevant to constitutional interpretation. My argument is that there is little or no difference between people who say they are originalists and people who say they aren't when it comes to actually applying the original meaning of the Constitution to specific cases. See notes 124-131 and accompanying text.

12. See Part 1(c) infra. See also Michael Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 Va. L. Rev. 669, 673 (1991); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 Tul. L. Rev. 1599, 1603 (1989). These articles, written almost ten years ago, both argued that the originalism debate was largely spent. Unfortunately, this message has not been well-received, as law professors con-

That role should be as clear to us as it was to Professor Machen—judges refer to the original meaning of the Constitution to provide an important link to our past culture and traditions, but the original meaning rarely dictates results in real cases because the context within which that meaning is applied is constantly changing.

The first part of this Essay supports these points by comparing Professor Machen's article to a recent argument among two of our most prominent legal thinkers, Justice Antonin Scalia and Professor Ronald Dworkin.[13] This comparison demonstrates that the debate over originalism has not moved forward in almost one hundred years. The second part of this essay discusses the academic debate over originalism and desegregation. This debate, perhaps more than any other, illustrates the futility of scholarly attempts to criticize or justify important Supreme Court decisions on an originalist basis, and supports my thesis that there is little reason for scholars to continue to argue about the appropriate role of original meaning in constitutional interpretation.

I. THE ORIGINALISM DEBATE

A. ARTHUR W. MACHEN

In 1900, there were only three university-affiliated law reviews—the *Harvard Law Review*, the *Yale Law Journal*, and the *American Law Review*, which was the predecessor to the *University of Pennsylvania Law Review*. As of that year, there had been only a handful of articles ever written on the subject of constitutional theory.[14] Nevertheless, Professor Machen's article exhaustively explored the originalism question. Here is how this extraordinary article began:

---

tinue to argue about the relevance of original meaning. See, e.g., Symposium, *Originalism, Democracy, and the Constitution*, 19 Harv. J.L. & Pub. Pol. 237-531 (1996); Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 Fed. L. Rev. 1 (1997); Cass R. Sunstein, *The Idea of a Useable Past*, 95 Colum. L. Rev. 601 (1995); Paul Horwitz, *The Past, Tense: The History of Crisis-and the Crisis of History-In Constitutional Theory*, 61 Alb. L. Rev. 459 (1997).

13. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton U. Press, 1997) ("*Interpretation*") (including a Comment by Ronald Dworkin, among others).

14. The most famous article, of course, is James Bradley Thayer's, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). See Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 Nw. U. L. Rev. 1-461 (1993).

> As the period of the formation of the American Union becomes more and more remote, it becomes constantly more important to inquire to what extent the decision of a question of federal constitutional law may properly be affected by the many changes in language, customs, morals, and in individual and national environment which have taken place since the adoption of our fundamental law.... Political opinions have changed: the doctrine of national unity has almost completely demolished its once mighty antagonist-the theory of state sovereignty. Commerce, instead of being conducted by stage-coaches and sail-boats, is carried on by railways, telegraphs, and ocean liners. Ideas of morality have changed: lotteries and duelling, once regarded as praiseworthy, are now thought pernicious and immoral. The effect of all these changes upon our system of constitutional law is surely an interesting and important matter for legal inquiry.... *The present paper deals with the problems which arise when a constitution, the letter of which remains unchanged, is to be applied by the courts to an altered state of facts.*[15]

After framing the issue, Professor Machen asked whether "it [is] ever possible to justify a departure from the original intention? Can the Constitution be changed, silently and without formal amendments?"[16] He addressed this question by distinguishing two different "schools of opinion" regarding the interpretation of constitutional language.[17] One school, the "strict and literal constructionists," looked only to the "dictionary meaning" of the Constitution's words to discover the intentions of the Framers.[18] The other school, the "broad constructionists," believed in looking for the "actual intent" of the Framers in whatever way possible, sometimes giving a "forced or ungrammatical" meaning to the Constitution's words.[19] Although they employed different means, both schools were in agreement that, if ascertainable, the intentions of the Framers are "sovereign."[20]

Professor Machen next considered whether there were any exceptions to the rule that the Framers' intentions, if discoverable, must control constitutional interpretation. He suggested that "the most plausible ground for violating the intention of the

15. Machen, 14 Harv. L. Rev. at 200 (cited in note 2) (emphasis added).
16. Id. at 201.
17. Id. at 203.
18. Id.
19. Id.
20. Id.

framers is to be found in considerations of expediency."[21] He outlined the argument that modern commentators have recycled as the "dead hand" argument: "[t]o follow out precisely in all cases the will of men who lived over a century ago may, in certain contingencies, from the standpoint of policy, be extremely undesirable."[22] The Constitution, the supporters of this view argued, was intended by the Framers to be "elastic and adaptable to changed conditions," and it must be "a living, growing organism, capable of adapting itself to all the multiplex conditions in which the nation may be involved."[23] The Framers, according to this view, could not have intended that a political instrument designed to "endure through all time should always bear the same construction."[24] The Constitution "is not dead but living."[25]

Professor Machen rejected these arguments. If the intent of the Framers could be evaded for reasons of policy, he argued, the Constitution would lose its force as binding law. He suggested that there is no "middle ground" between following the Framers' intentions and deviating from those intentions for policy reasons.[26] Although an originalist doctrine might hamper the operations of the government, the alternative would give the judiciary the power to alter the Constitution and place the courts above the Constitution. That result would jeopardize our system of government and threaten the advantages of being governed by a "fixed organic law."[27]

Professor Machen anticipated the objection that the Framers were not of one mind on many matters and therefore the search for their specific intentions would be difficult, if not impossible. He responded that the search is not for the Framers' specific intentions which "if admissible at all, are received merely as evidencing the intention which the words, construed in light of the surrounding circumstances, reasonably express."[28] Instead, it is this "expressed intention" which judges must try to ascertain when deciding difficult cases.[29]

Professor Machen acknowledged that his discussion of originalism was predicated on the assumption that in a particular

21. Id. at 204.
22. Id.
23. Id. at 204-05.
24. Id. at 204.
25. Id. at 205.
26. Id. at 205-06.
27. Id. at 205-07.
28. Id. at 211.
29. Id.

case the Framers' intentions could be ascertained. He conceded that the "imperfection and vagueness of human language [and] the difficulty of placing ourselves in the position of men who lived so long ago," causes great difficulty for "the interpreter of the Constitution."[30] When the intentions are unclear, Professor Machen suggested, judges should rely on practical rules of construction, and legislative and administrative practice, to decide constitutional issues. Even in such cases, however, Professor Machen warned against using modern notions of expediency to decide interpretive questions. Although he recognized a judge will "almost inevitably be unconsciously influenced by his knowledge of the immediate ill effects which a theoretically correct judgment might produce," he hoped that judges would not take into account policy considerations that would not have been accepted by the Framers.[31] Otherwise, judges might reach a different interpretation of the language than would a court sitting immediately after the nation was formed.[32] This practice, according to Professor Machen, "should never be followed."[33]

In Part I of his article, Professor Machen sounds like a strict originalist. He urged judges to use all available tools to discover what the words of the Constitution meant at the time they were written, and argued that contemporary policy considerations should be ignored in determining those intentions. If those intentions are undiscoverable, standard rules of construction and deference to the political branches should guide constitutional decision-making. Contemporary originalists such as Judge Bork and Justice Scalia would find little to complain about in this advice to judges.[34] As we will see shortly, however, Part II of Professor Machen's article undercuts much of his reliance on originalism.

Professor Machen began the second part of his article with the acknowledgment that, even when judges apply the rule that the original intentions of the Framers control constitutional interpretation, it "does not follow that an act which was unconstitutional one hundred years ago must necessarily be so held today."[35] Although the construction of the Constitution by judges

30. Id. at 215.
31. Id. at 216.
32. Id.
33. Id.
34. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990) ("*Tempting*"); Scalia, *Interpretation* at 38, 45-46 (cited in note 13).
35. Machen, 14 Harv. L. Rev. at 273 (cited in note 2).

must not change, the validity of legislative acts often turns on the factual context of a case, which may be completely different from one generation to the next. According to Professor Machen:

> The separation of the law from the facts is a difficult but transcendently important task. *For while denying in the most unqualified terms the notion that the Constitution is capable of a varying construction, we may often be swayed by the same arguments advanced in favor of that heresy, and even reach the same results, but in a perfectly legitimate way, simply by a careful discrimination between matters of law and fact.* The law of the Constitution remains forever unchanging: the facts to which it must be applied are infinitely various.[36]

Professor Machen provided as an example of this thesis the case of margarine. He suggested that a law passed at the behest of margarine sellers in the year 1900 forbidding the sale of butter would be construed by the courts as an arbitrary denial of due process of law. But if the facts changed and people began to prefer margarine to butter, and the same people were concerned that sellers of butter were trying to pass off that product as margarine, then on "those facts . . . the legislature might constitutionally prohibit the manufacture and sale of butter . . . just as acts absolutely forbidding the sale or manufacture of oleomargarine are now . . . upheld."[37] In that circumstance, the interpretation of the Constitution has not changed—the same definition of 'due process' would be given. It is the facts which would have changed."[38]

Pursuant to this analysis, identical laws in different states might be treated differently by the Supreme Court. Professor Machen questioned the Supreme Court case of *Brass v. Stoeser,*[39] in which the Court held that a grain elevator in a small town was subject to reasonable regulation in light of a prior case involving elevators in New York City and Buffalo.[40] The Court rejected the plaintiff's argument in *Stoeser* that the facts of its case were different because of the small-town nature of its business, on the basis that the plaintiff's argument raised "purely legislative" considerations.[41] Professor Machen took issue with that reasoning,

---

36. Id. (emphasis added).
37. Id. at 274 (citing *Powell v. Pennsylvania*, 127 U.S. 678 (1887)).
38. Machen, 14 Harv. L. Rev. at 275 (cited in note 2).
39. 153 U.S. 391 (1894).
40. Machen, 14 Harv. L. Rev. at 276 (cited in note 2).
41. Id.

arguing that individual factual circumstances should control the constitutionality of the law at issue in *Stoeser* because the "habits, manners, opinions and needs of the people of the several states are so widely divergent that what would be arbitrary in one state at one time may, at the same time in another state, or at another time in the same state, be harmless and even beneficent."[42]

Professor Machen conceded that these kinds of factual considerations and distinctions are "more legislative than judicial."[43] Moreover, this kind of analysis "opens up to the courts many matters unsuited for judicial discussion."[44] American judges must realize, however, that many problems of government that in other countries would be resolved by legislatures are submitted here to federal judges.[45]

Professor Machen also argued that the relevance of changed circumstances to constitutional decision-making often depends on difficult questions of interpretation of the Constitution's language and history. For example, he asked whether the Eighth Amendment's prohibition on "cruel and unusual punishments" meant "unusual when the amendment was adopted, or unusual when the punishment is inflicted."[46] Professor Machen did not resolve this question. He noted that all of "the familiar arguments in favor of an 'elastic constitution' may be urged in support of that construction [which tests constitutionality as of the time the punishment is imposed]. The fact that the Constitution was intended to endure perpetually, the importance of leaving the legislature . . . free to adopt such measures as the sentiment of the people may permit or require—these are legitimate reasons for interpreting 'unusual' to mean unusual when the penalty is exacted."[47] Professor Machen noted that there were counter-arguments, however, and he concluded that "either interpretation is permissible, and that either may be adopted without conflicting with the sound theory of constitutional construction; and that the same thing is true in other similar cases."[48]

At the end of his article, Professor Machen summarized his theory of constitutional interpretation as follows: 1) the inten-

42. Id. (citations omitted).
43. Id. at 277 (citation omitted).
44. Id.
45. Id.
46. Id. at 280.
47. Id. at 283 (citation omitted).
48. Id.

tions of the Framers must always prevail (absent *stare decisis* concerns); 2) the construction of the Constitution, being dependent on the fixed intentions of the Framers, never changes; but 3) a law which is valid at one time may be invalid at another, and *vice versa*, because of a change in the facts to which the law is applied.[49]

Many contemporary commentators echo much of Professor Machen's analysis. First, the legal principles embodied in the Constitution, as evidenced by the text and the intentions of the Framers, do not change.[50] Second, the constitutionality of actions of the political branches and the states do vary over time because society and its values are constantly in flux.[51] Third, there are constitutional provisions, such as the Eighth Amendment, which the Framers might have originally intended to have a variable meaning over time.[52] Finally, although the search is for the original meaning of the text, the difficulty of reconstructing that meaning poses a serious obstacle to the originalist project.[53]

The remainder of this essay is devoted to sustaining three points about this analysis. First, virtually all judges and scholars agree with these statements about constitutional interpretation; second, this analysis gives us little guidance in describing how specific constitutional cases should be decided; and third, after recognizing these points, there is almost nothing left of interest to say about the originalism question.

B. THE CONTEMPORARY DEBATE

Almost one hundred years after Professor Machen wrote his article, Justice Scalia delivered the Tanner Lectures at Princeton University, and Professor Ronald Dworkin, among others, was invited to respond to Scalia's comments. These lectures were later consolidated into a book.[54] Although the subject of these

49. Id. at 284.

50. See Scalia, *Interpretation* at 40 (cited in note 13).

51. See Bork, *Tempting* at 169 (cited in note 34) (explaining that even though the framers of the Fourteenth Amendment thought segregation was legally permissible, changed circumstances pertaining to the importance of public school education and the impossibility of truly equal separate schools justified the *Brown* decision).

52. See Ronald Dworkin, *Comment*, in Scalia, *Interpretation* at 120-21 (cited in note 13).

53. See Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 Harv. J.L. & Pub. Pol. 437, 440 (1996) (stating that for most constitutional issues, "careful historical analysis of the same evidence may yield opposite conclusions.").

54. See Scalia, *Interpretation* (cited in note 13).

talks went beyond the originalism debate and even constitutional interpretation, the main focus for most of the participants was judicial interpretation of vague constitutional language. Our discussion begins with Justice Scalia's initial remarks.

1. Justice Scalia

Like Professor Machen, Justice Scalia argued that judges engaged in constitutional interpretation should look for "the original meaning of the text, not what the original draftsmen intended."[55] Scalia stated that he consults the writings of the Framers, not because their intentions are authoritative, but because those writings, like the works of other informed people of the time, shed light on how the Constitution was originally understood. But the key is the text, not the intentions of those who drafted the text, otherwise "democratically adopted texts" will be "mere springboards for judicial lawmaking."[56]

Scalia then noted that the "Great Divide" in constitutional interpretation is between those who believe in looking to the original meaning of the Constitutional text, and those who look at its current meaning.[57] The latter believe in what Scalia, like Professor Machen, called a "Living Constitution," which grows from generation to generation and allows judges to determine the needs of an ever-changing society.[58] According to Scalia, those who believe in the "Living Constitution" have transformed constitutional interpretation into a common law method of adjudication. Judges decide cases by examining precedent to determine whether the logic of prior cases should be extended to the new case based on what result the judges prefer in the case at hand.[59] Under this interpretive regime, Justice Scalia argued, "what the Constitution meant yesterday is not necessarily what it means today."[60]

Scalia claimed to disagree with this method of constitutional interpretation.[61] He argued that a Constitution does not suggest

---

55. Id. at 38.
56. Id. at 25.
57. Id. at 38.
58. Id. See also Machen, 14 Harv. L. Rev. at 204 (cited in note 2).
59. This descriptive account of constitutional interpretation is very much in vogue and I think extremely accurate. See Eric J. Segall, *The Skeptic's Constitution*, 44 UCLA L. Rev. 1467, 1504 (1997) (citing David Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 879 (1996)).
60. Scalia, *Interpretation* at 39-40 (cited in note 13).
61. For examples of Scalia applying the methodology he criticizes, see notes 99-107, and accompanying text.

changeability, but rather "its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.... Neither the text of such a document nor the intent of its framers ... can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts."[62]

Like Professor Machen, Scalia acknowledged that the principal argument in favor of a "Living Constitution" is expediency—we need a flexible Constitution that can bend and grow with changing problems and concerns. Also like Professor Machen, Scalia rejected this rationale.[63] The problem, according to Scalia, is that there is no agreement on what principles are to govern the evolution of constitutionally imposed restrictions on government. Should a judge decide cases based on the "will of the majority, discerned from newspapers.... Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle?"[64] The "evolutionists," as Scalia called them, are divided "into as many camps as there are individual views of the good, the true, and the beautiful.... which means that evolutionism is simply not a practicable constitutional philosophy."[65]

Scalia has made these points before in his writing.[66] His answer is what he calls a "faint-hearted" originalist approach to constitutional interpretation, which he conceded often leaves room for significant disagreement among judges and scholars.[67] He provided as an example the application of the First Amendment to new technologies and suggested that such a task is not mechanical but requires judgment. Nevertheless, he argued that the difficulties of applying originalism pale compared to the problems of interpreting a Constitution that changes over time. He described those problems as follows:

> The originalist, if he does not have all the answers, has many of them.... For the evolutionist, on the other hand, every question is an open question, every day a new day. No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional, *even though*

62. Scalia, *Interpretation* at 40-41 (cited in note 13).
63. Id. at 41, 44-45.
64. Id. at 45.
65. Id.
66. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) ("Scalia, *Originalism*").
67. Id. at 862, 864.

> *its use is explicitly contemplated in the Constitution....* No matter. Under The Living Constitution the death penalty may have *become* unconstitutional. And it is up to each Justice to decide for himself (under no standard I can discern) when that occurs.[68]

Justice Scalia's theory of constitutional interpretation tracks the originalism discussed in Part I of Professor Machen's article. He agrees with Professor Machen that constitutional principles do not change over time, even if sometimes it is difficult to identify those principles and apply them to unforseen circumstances. As we will see from Professor Dworkin's response, however, Scalia's originalism, like the originalism discussed in Part II of Professor Machen's article, does very little work in hard constitutional cases.

2. Ronald Dworkin

Professor Dworkin responded to Scalia by making a distinction between "semantic originalism" and "expectation originalism."[69] A semantic originalist believes that constitutional provisions should be interpreted according to what the drafters intended to say. An expectation originalist, however, interprets those provisions according to what specific consequences the Framers expected them to have.[70] Dworkin used the Equal Protection Clause of the Fourteenth Amendment to illustrate this distinction. An expectation originalist would argue that the Framers of the Fourteenth Amendment did not expect that Amendment to prohibit segregated schools, and therefore *Brown v. Board of Education,*[71] was incorrectly decided. A semantic originalist, on the other hand, would try to discover what the Framers intended to say when they adopted the Fourteenth Amendment—what general principle they were setting forth. This inquiry would lead to the identification of a broad principle of political equality which, by 1954, condemned racial segregation. Therefore, a semantic originalist could agree with the *Brown* decision.[72] In other words, although the principle embodied by the Fourteenth Amendment would not change, the factual context to which it applied might change, and what peo-

68. Scalia, *Interpretation* at 46 (cited in note 13) (emphasis in original).
69. Dworkin, *Comment* at 119 (cited in note 52).
70. Id.
71. 347 U.S. 483 (1954).
72. Dworkin, *Comment* at 119 (cited in note 52).

ple considered equal in 1865 might be deemed unequal in 1954. This sounds similar to Part II of Professor Machen's article where he discussed how changed circumstances might lead to the invalidation of a practice judges once ruled constitutional.[73]

Dworkin asserted that if Scalia were faithful to his textualist-originalist approach to constitutional interpretation he would be a semantic originalist. He wouldn't look to what specific consequences the Framers intended, but rather to what they actually said in the Constitutional text under consideration. But Dworkin argued Scalia's own example of the death penalty demonstrates that Scalia will look to the Framers' subjective intentions, not just to the words they wrote.[74]

Scalia argued that the death penalty cannot be unconstitutional because the Fifth Amendment provides that no person shall be deprived of life without due process of law, and also requires a grand jury indictment for capital crimes.[75] Therefore, the Framers must have believed the death penalty was constitutional despite the Eighth Amendment. Dworkin argued, however, that a true semantic originalist, a person who cared more about the text of the Eighth Amendment than what its Framers believed it to mean, would have to determine whether the ban on cruel and unusual punishments meant cruel and unusual at the time of the adoption of the Amendment or cruel and unusual when the sentence was actually imposed. This is the precise issue raised by Professor Machen in his article.[76] Dworkin, like Machen, argued that this question is a difficult one, and that therefore Scalia's biting criticism of those Justices who believe the death penalty violates the Eighth Amendment is inconsistent with a strong textualist-originalist approach to constitutional interpretation.

Dworkin also took Scalia to task for his remarks about the Fourteenth Amendment. Scalia argued in his initial comments that the Equal Protection Clause allowed distinctions based on gender when it was adopted, as well as in 1920, and therefore should be interpreted the same way today.[77] Dworkin conceded the Framers of the Fourteenth Amendment probably did not expect it to apply to gender.[78] He argued, however, that a true

73. See Machen, 14 Harv. L. Rev. at 273-75 (cited in note 2).
74. Dworkin, *Comment* at 120-21 (cited in note 52).
75. Scalia, *Interpretation* at 46 (cited in note 13).
76. See note 46 and accompanying text.
77. See Dworkin, *Comment* at 125-26 (cited in note 52).
78. Id. at 125.

semantic originalist would dismiss those expectations as evidence of what the Framers thought would happen and instead pay more careful attention to the language the Framers actually used. And that language, "equal protection of the laws," does not make a distinction between racial and sexual discrimination. The text is "perfectly abstract, general, and principled."[79] Scalia, contrary to his own statements, "reads into [the] language limitations that the language not only does not suggest but cannot bear, and he tries to justify this mistranslation by attributing understandings and expectations to statesmen that they may well have had, but that left no mark on the text they wrote."[80]

So, Dworkin asks, why does the "resolute text-reader, dictionary-minder, expectation scorner," change his mind when it comes to the "most fundamental American statute of them all?"[81] Dworkin hypothesized that a true textualist-originalist would conclude that many of the provisions of the Bill of Rights were written so generally and vaguely that the Framers must have intended them to be interpreted over time. Had the Framers intended these provisions to have a fixed meaning, they would have written them differently, more specifically. Of course, this generally means that judges will have great discretion to interpret those phrases, which explains why many modern-day conservatives, like Justice Scalia, reject semantic originalism—it affords judges too much power. But Scalia has already rejected looking at the expectations of the Framers at the expense of the text.[82] Scalia's textualism-originalism, therefore, is selective and inconsistent. A true originalist, according to Dworkin, would interpret the Constitution the way the Framers intended—as embodying broad principles that judges must apply to differing factual situations by employing independent moral judgment.[83] This "magnet of political morality is the strongest force in jurisprudence," and the Constitution reflects that principle in its broad provisions protecting liberty and equality.[84]

---

79. Id. at 126.

80. Id.

81. Id. Scalia agrees with Dworkin about the importance of the Equal Protection Clause. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989). For a fuller discussion, see Eric Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 Geo. Wash. L. Rev. 991, 1000 (1994).

82. See notes 55-56 and accompanying text.

83. See Dworkin, *Comment* at 126 (cited in note 52).

84. Id. at 127.

Dworkin's response to Scalia sounds similar to Part II of Professor Machen's article. In fact, Dworkin's "semantic originalist," would do exactly what Professor Machen suggested—identify the broad principles set forth by the Framers of the Constitution and apply those principles to an ever-changing society.[85] Because circumstances do change, a practice like segregation that judges once considered constitutional may later be deemed by them to be unconstitutional if what society once considered equal under the law may at a future time be considered unequal.[86] The relevant principle remains the same, equality, but its specification in particular cases inevitably changes over time.

In his response, Scalia accepted the distinction between semantic-originalism and expectation-originalism and even conceded that he embraces the former.[87] Scalia also agreed with Dworkin that the Eighth Amendment contains an abstract principle prohibiting cruel and unusual punishments not a "highly-particularistic" and "concrete" rule.[88] That is why Scalia said he would invalidate tortures that were unknown when the Constitution was written.[89] Scalia disagreed with Dworkin, however, as to whether the Framers intended the Eighth Amendment to be a time-dated rule with a fixed meaning or a variable standard that changes depending upon the current generation's moral precepts. On this question, Scalia suggested that broad moral principles, unlike more specific factual assessments, are permanent. He stated that "[t]he Americans of 1791 surely thought that what was cruel was cruel, regardless of what . . . future generation[s] might think about it."[90] Moreover, he argued that if the Bill of Rights does not install permanent law-like rules but rather vague, aspirational moral precepts, why should federal judges be its ultimate interpreters?[91]

This disagreement between Justice Scalia and Ronald Dworkin over whether the Eighth Amendment specifically, and the Constitution generally, should be interpreted as time-dated or not, fails to advance the originalism debate beyond Professor Machen's discussion. As noted earlier, Professor Machen also

85. See notes 35-45 and accompanying text.
86. Dworkin, *Comment* at 119 (cited in note 52).
87. Scalia, *Interpretation* at 144 (cited in note 13).
88. Id.
89. Id. at 145.
90. Id. at 146.
91. Id. at 147-48.

questioned whether the Eighth Amendment should be interpreted as having a fixed or variable meaning, and he said:

> [W]henever the Constitution, expressly or by implication, refers to custom or opinion, the framers may have meant that prevailing either when the instrument was adopted or when it was interpreted and applied. If the latter construction be adopted, a change in custom or opinion might make a difference in the constitutionality of a statute. Otherwise, it could have no such effect. Thus, the Eighth Amendment forbids 'cruel and unusual punishments.' Does this mean unusual when the amendment was adopted, or unusual when the punishment is inflicted? The word was capable of either meaning. If the latter be correct, the lapse into disuse of a punishment formerly prevalent may be material in deciding whether at the present day it falls within the inhibition of the amendment, and a punishment once legal may perhaps be held now unconstitutional. If, however, the other construction be chosen, the frequency or infrequency with which the particular penalty is now imposed becomes wholly irrelevant. . . .
>
> [E]ither interpretation is permissible, and . . . either may be adopted without conflicting with the sound theory of constitutional construction.[92]

How is it that Justice Scalia and Ronald Dworkin arrive in exactly the same place as Professor Machen did one hundred years earlier, disagreeing over whether the Eighth Amendment lays down a rule frozen in time as of the date of enactment or a variable standard to be applied by later generations as they see fit? In the next section, I suggest they ended up in the same place because the question all three men asked, what role original meaning should play in constitutional interpretation, has limited utility and does not in practice generate truly different methods of constitutional interpretation.

C. ANALYSIS

Professor Machen argued that, whenever the Framers' intentions could be ascertained, original meaning should guide constitutional interpretation. Neither Justice Scalia nor Professor Dworkin would disagree with that statement.[93] Professor Machen further pointed out that the original meaning of the text does not change from one generation to the next; otherwise the

92. Machen, 14 Harv. L. Rev. at 280, 283 (cited in note 2).
93. See notes 61-66, 81-84 and accompanying text.

Constitution would lose its status as the fundamental law of the land.[94] Neither Justice Scalia nor Professor Dworkin would disagree with that statement. In fact, Professor Dworkin argued that the notion that the Bill of Rights contains provisions that "are chameleons which change their meaning to conform to the needs and spirit of new times . . . is hardly even intelligible, and I know of no prominent contemporary judge or scholar who holds anything like it."[95] Finally, Professor Machen raised the question whether vague constitutional provisions such as the Eighth Amendment should be interpreted to lay down fixed time-dated rules or broad, general principles that must be applied by judges according to the morality of the interpreting generation.[96] This question, he said, is a difficult one that must be answered by looking at the meaning the provision bore when adopted. Again, neither Justice Scalia nor Professor Dworkin disagree that this is the relevant inquiry. They only purport to disagree over the answer to the question.[97]

If Justice Scalia actually applied a rigorous originalist approach to constitutional interpretation that did not take into account changed circumstances, and if he only invalidated political decisions that were inconsistent with the specific intent of the Framers, then there might be an important difference between Justice Scalia's and Ronald Dworkin's views on originalism. The problem is that Justice Scalia, like virtually all judges, does not apply a rigorous originalist approach to cases he actually decides. He has invalidated political decisions without clear evidence that those decisions were inconsistent with original understandings.[98] For example, numerous commentators have pointed out that Scalia's takings jurisprudence is completely inconsistent with the original understanding that only a physical imposition constituted a constitutional violation.[99] Additionally, his votes to overturn flag burning laws, hate speech laws, and affirmative action

94. See notes 26-27 and accompanying text.

95. See Dworkin, *Comment* at 122 (cited in note 52).

96. See notes 46-48 and accompanying text.

97. See notes 76-84, 90-91 and accompanying text.

98. I have previously argued that Scalia's judicial project is centered more on the articulation of clear rules than any real commitment to originalism or textualism. See Segall, 62 Geo. Wash. L. Rev. at 1004 (cited in note 81).

99. See, e.g., Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 40 (1997); William W. Fisher III, *The Trouble with* Lucas, 45 Stan. L. Rev. 1393, 1393-94 (1993); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 804-09 (1995).

programs cannot be reconciled with a strictly originalist approach to constitutional interpretation.[100]

More importantly, contrary to what Justice Scalia argued in his recent book, he does take into account changed circumstances when he engages in Constitutional interpretation. For example, the issue in *Minnesota v. Dickerson*,[101] was whether the Fourth Amendment allows the seizure of contraband detected by a police officer during a protective search permissible under *Terry v. Ohio*.[102] The Court held that the police officer violated the ban on "unreasonable searches and seizures" by "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'—a pocket which the officer already knew contained no weapon."[103]

Justice Scalia wrote a concurring opinion, the beginning of which sounds very much like Part I of Professor Machen's article. Scalia began by saying that "I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification."[104] Therefore, according to Scalia, the right to be free from "unreasonable searches and seizures," must be construed in light of what those words meant when the Constitution was adopted.[105] Scalia then suggested that he was not sure whether the *Terry* rule, allowing a person to be frisked prior to arrest to insure he has no hidden weapons, was a proper interpretation of the Fourth Amendment. He doubted that "the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity . . . ."[106] But Scalia went on to articulate an approach to this case strikingly similar to the one advocated by Professor Machen in the second part of

100. See Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-32 (1997) (arguing that both Justice Scalia's and Justice Thomas' self-proclaimed originalism is inconsistent with declaring affirmative action programs unconstitutional under the Fourteenth Amendment because the same Congress that approved that Amendment also funded programs specifically for blacks.); Laurence H. Tribe, *Comment*, in Scalia, *Interpretation* at 80-81 (cited in note 13) (citing *Texas v. Johnson*, 491 U.S. 397 (1989), *United States v. Eichman*, 496 U.S. 310 (1990), *R.A.V. v. City of St. Paul*, 112 S. Ct. 2838 (1992)).

101. 508 U.S. 366 (1993). The point of this discussion relating to Scalia's originalism was first made in Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan L. Rev. 395 (1995).

102. 392 U.S. 1 (1968).

103. *Dickerson*, 508 U.S. at 378.

104. Id. at 379 (Scalia, J., concurring).

105. Id. at 379-80.

106. Id. at 381.

his article. Justice Scalia said that, "even if a 'frisk' prior to arrest would have been considered impermissible in 1791 . . . perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly . . . have become common—*which might alter the judgment of what is 'reasonable' under the original standard.*"[107] In other words, even if the Framers had specifically considered the validity of protective frisks before arrest, and even if they had decided that such frisks were invalid, the identical issue may be decided differently by a later generation because of changes that have taken place since the Constitution was adopted. If, according to Scalia, the interpretation of the word "unreasonable" to a given set of facts can change, why can't the meaning of phrases like "cruel and unusual punishments," "equal protection," and "due process," also change? In his *Dickerson* concurrence, Justice Scalia employed the same "semantic originalism" advocated by Ronald Dworkin today and envisioned by Professor Machen almost one hundred years ago.

The fact that Justice Scalia does not actually apply the originalist approach he advocates in his academic writings to his judicial decisions does not by itself mean that such a project is impossible or wrong headed, just that Scalia is not committed to it. The question is, does anyone consistently apply an approach to constitutional interpretation where judges ignore changed circumstances and invalidate acts of the political branches only if there is strong evidence that the Framers of the Constitution intended to prohibit the specific practice at issue? This kind of interpretive regime would sharply limit the judicial role with regard to most constitutional provisions and lead to a system of strong judicial deference. Cass Sunstein, in his recent review of Justice Scalia's book, outlined the likely results of this kind of constitutional interpretation.[108] According to Sunstein, Scalia's project, if carried out consistently, could lead to the overruling of such cases as *Brown v. Board of Education*,[109] and *New York Times v. Sullivan*.[110] Furthermore, it could mean that sex discrimination would not be constitutionally objectionable; that the Establishment Clause would not apply to the states; that the Equal Protection Clause would not apply at all to the federal

107. Id. at 382 (emphasis added).

108. Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 Yale L.J. 529, 563 (1997).

109. 347 U.S. 483 (1954).

110. 376 U.S. 254 (1964) (holding that actual malice is required for defamation of public officials).

government; and that "most of modern constitutional law, now taken as constitutive of the American constitutional tradition by Americans and non-Americans alike . . . is illegitimate and fatally undemocratic."[111]

Professor Sunstein seems to assume that this kind of radical approach to constitutional interpretation takes originalism more seriously than an approach that argues that the Constitution's principles must be applied to an ever-changing society. As Professor Machen suggested, however, we do not know whether the Framers intended the open-ended provisions of the Constitution to be given a fixed time-dated meaning or a variable one.[112] If the Framers intended the latter, then strict originalism would be inconsistent with itself. Moreover, the Supreme Court has almost always treated the "original understanding . . . as merely one source of constitutional meaning among several, not a general theory of constitutional interpretation, much less the exclusive legitimate theory."[113]

A true and sincere originalist could rationally conclude that the Ninth Amendment,[114] and the Privileges or Immunities Clause,[115] demonstrate that the Framers of those texts believed judges would define and enforce fundamental constitutional rights not explicitly mentioned in the text and not necessarily in existence at the founding.[116] Conversely, a sincere originalist could argue that the framers never expected judges to have such significant discretion in answering difficult moral and ethical questions.[117] But these are all arguments about what the Constitution originally meant, not about whose intentions—the Fram-

111. Sunstein, 107 Yale L.J. at 564 (cited in note 108).

112. See notes 46-48 and accompanying text.

113. James E. Fleming, *Fidelity to our Imperfect Constitution*, 65 Fordham L. Rev. 1335, 1347 (1997).

114. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., Amend. IX.

115. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const., Amend. XIV, § 2.

116. See Perry, 77 Va. L. Rev. at 717 (cited in note 12) ("The indeterminacy of the interpretative inquiry constitutive of the originalist approach is even greater . . . if an aspect of the original meaning of the ninth amendment is that there are unenumerated constitutional rights against the federal government; or if the original meaning of the privileges and immunities clause of the fourteenth amendment is to the effect that there are particular, albeit unenumerated, constitutional rights . . . against state governments."). See also Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 Nw. U. L. Rev. 175, 182 n.24 (1993) (arguing that framers may well have intended that judges enforce natural rights).

117. See Raoul Berger, *Ronald Dworkin's* The Moral Reading of the Constitution: *A Critique*, 72 Ind. L.J. 1099, 1100-02 (1997).

ers or current judges—should control, or what role originalism should play in constitutional interpretation. Originalism can lead to very different systems of judicial review.[118]

Moreover, there are very few scholars, and no judges, who consistently apply a model of judicial review like the one described by Professor Sunstein.[119] This kind of "[s]trict originalism is an interpretive methodology doomed to failure . . . ."[120] If constitutional interpretation were only about reconstructing what the Framers thought about specific problems and then limiting judicial invalidation of contemporary political acts to those practices the Framers thought unconstitutional, the "dead hand" problem would emerge with a vengeance.[121] Why should today's judges be governed by people who lived long ago in radically different circumstances? As Michael Klarman has said:

> The ideological world of the Framers seems light years removed from our own. Most of them thought it acceptable to hold property in human beings (and those who didn't were prepared to compromise the issue). Virtually all of them believed that married women should be treated, in essence, as the property of their husbands. The Founders generally assumed that people without property should not participate in politics, either because they lacked a sufficient stake in the community to justify their participation in its governance or because their poverty deprived them of the independence necessary for the exercise of responsible citizenship. The Framers, as a group, were more deeply religious than Americans are today—a fact that undoubtedly predisposed the Framers more toward a belief in natural law . . . than today's more cynical generation.[122]

The Framers could not possibly have anticipated many of the fundamental characteristics of our society—so why would we defer to their opinions on problems they never could have understood? Because of this problem, few judges or scholars are willing to rely completely on the understandings of the drafting

---

118. See Perry, 77 Va. L. Rev. at 712 (cited in note 12) (arguing that nothing in the originalist approach to constitutional interpretation dictates whether a judge will believe that she should take either a strong or passive role in fleshing out constitutional norms).

119. See Lessig, 47 Stan. L. Rev. at 439-40 (cited in note 101) (Even if "we could imagine a practice that attempted to decide cases based upon original views of uncontested matters, regardless of how those views have evolved . . . it has never been the practice of any court [to do so] and this for good reason.").

120. Barry Friedman, *The Turn to History*, 72 N.Y.U. L. Rev. 928, 961 (1997).

121. See notes 22-24 and accompanying text.

122. Michael J. Klarman, *Antifidelity*, 70 S. Cal. L. Rev. 381, 383-84 (1997).

generations to resolve constitutional problems. Every "form of originalism makes a choice about which of the changes in context . . . will be accommodated in the current context. Some changes are always accounted. The question is just which."[123]

Because of the "dead hand" problem, even self-proclaimed originalists concede that they are searching for the broad principles that were part of the original meaning and not trying to discover how the Framers would have decided specific cases. For example, Judge Bork has said that "[t]he objection that we can never know what the [framers] would have done about specific modern situations is entirely beside the point. The originalist attempts to discern the principles the [framers] enacted, the values they sought to protect."[124] Professor Machen also recognized this point when he insisted that an ever-changing society governed by vague constitutional language will have to accept that what the Constitution meant yesterday in a given case (as opposed to the principles the Constitution embodies), it might not mean tomorrow.[125] By moving the level of generality from what the Framers thought about specific questions to an examination of the broad principles they set forth, originalists like Bork and Machen can claim fidelity to original meaning but retain enough discretion to incorporate contemporary moral evaluations into constitutional interpretation.[126]

Once strict originalism is taken off the table, and it has been off the table for a long time, there are no stakes left to arguing about the originalism question. The softer form of originalism advocated by Professor Machen, Judge Bork, and Ronald Dworkin, and the kind actually applied by Justice Scalia in his decisions,[127] removes the constraint of original meaning as applied to open-textured constitutional interpretation.[128] This move from specific intentions to general principles also eliminates any meaningful distinction between originalism and nonoriginalism because the Constitution's broad phrases are de-

123. Lessig, 47 Stan L. Rev. at 440 (cited in note 101).

124. Robert Bork, *Original Intent and the Constitution*, Humanities at 22, 26 (Feb. 1986) (cited in Perry, 77 Va. L. Rev. at 684 n.46 (cited in note 12)).

125. See notes 35-42 and accompanying text.

126. See John T. Valauri, *The Varieties of Constitutional Theory: A Comment on Perry and Hoy*, 15 N. Ky. L. Rev. 499, 505 (1988).

127. See notes 99-107 and accompanying text.

128. See Erwin Chemerinsky, *Foreward: The Vanishing Constitution*, 103 Harv. L. Rev. 43, 93 (1989) ("[T]o be nonabsurd originalism must look to abstract intent but looking to abstract intent does not eliminate judicial value choices"). See also Perry, 77 Va. L. Rev. at 711, 716-18 (cited in note 12).

fined at a level of generality that make them useless in hard cases for anything other than symbolic purposes.[129] Judges can use originalism to show fidelity to history and heritage, but at the same time they must recognize that an originalist approach that identifies broad principles instead of specific intentions does little to resolve hard constitutional questions.[130] This is the truth about originalism and there is little more to say about the question.[131]

II. BROWN AND ORIGINALISM

In a recent essay on affirmative action, Professor Jed Rubenfeld of the Yale Law School commented that "no one today is a true equal protection originalist, because true equal protection originalism would repudiate *Brown v. Board of Education*."[132] Professor Rubenfeld is a brilliant scholar who has written numerous interesting articles on constitutional law.[133] Nevertheless, his statement about originalism and the *Brown* decision is overstated and reveals quite a bit about the dismal state of the originalism debate.

---

129. See Solum, 63 Tul. L. Rev. at 1612-13 (cited in note 12) ("Under this conception of originalism, the application of a provision of the Constitution to a particular case should be determined in light of the 'value' or 'principle' that prompted its adoption. But nonoriginalist theories of constitutional interpretation also seek general values and principles.... If both the originalist and the nonoriginalist are looking for 'convictions,' 'principles,' and 'values' that prompted the adoption of the Constitution, what is the difference between what originalists and nonoriginalists do?").

130. See Perry, 77 Va. L. Rev. at 711 (cited in note 12) ("Originalism runs out before many of the most important constitutional conflicts that engage the judiciary are resolved.").

131. As mentioned earlier, the Supreme Court has never consistently adopted an originalist approach to constitutional interpretation. I am currently working on a project which will establish this point through a survey of Supreme Court cases. The following are just a few of the important Supreme Court cases devoid of any serious originalist analysis. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Reynolds v. Simms*, 377 U.S. 533 (1964); *Roe v. Wade*, 410 U.S. 113 (1973); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Elrod v. Burns*, 427 U.S. 347 (1976); *Texas v. Johnson*, 491 U.S. 397 (1989); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992). On occasion, the Court does use an originalist approach but invariably the Justices disagree on what the relevant history establishes. See, e.g., *Dred Scott v. Sanford*, 19 How. (60 U.S.) 393 (1857); *South Carolina v. United States*, 199 U.S. 437 (1905); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997); *Printz v. United States*, 117 S. Ct. 2365 (1997).

132. Rubenfeld, 107 Yale L.J. at 432 (cited in note 100).

133. See, e.g., Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 Fordham L. Rev. 1469 (1997); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 Yale L.J. 1119 (1995).

Let's unpack Professor Rubenfeld's statement. First, he assumes that a "true" originalist would have to find *Brown* was incorrectly decided. But this assumes a true originalist believes that resort to original meaning is the only legitimate interpretative tool for judges exercising judicial review. However, as noted earlier, it is virtually impossible to find anyone who really believes constitutional interpretation is only about the search for original meaning.[134] That kind of approach raises such significant dead hand problems that few scholars, and no Supreme Court Justices, embrace it.[135] If we define originalism to mean historical analysis is the exclusive method of constitutional interpretation, then Professor Rubenfeld is right—there are no true originalists. But that statement, like most discussions of originalism, fails to advance the debate.

Professor Rubenfeld also ridicules the originalism of Robert Bork, as well as others, who would approve of *Brown* on the basis that, by 1954, the equality the Framers believed in was "mutually inconsistent," with segregated schools, even if that had not been the case in 1868.[136] Rubenfeld argues that "[o]riginalism is no longer the method it [is] claimed to be if judges are free to reject the specific understanding of a constitutional provision in light of a more general putative 'purpose' such as 'equality.'"[137] Although I agree that many originalists, such as Judge Bork and Justice Scalia, employ the rhetoric of original meaning selectively, Professor Rubenfeld's theoretical argument is questionable. As Professor Machen told us one hundred years ago, although the principles underlying the Constitution do not change, facts do, and therefore so do constitutional decisions.[138] The Framers did not textually adopt the position that segregated schools were constitutional. At most, they thought segregated schools at the time did not violate the equal protection of the laws. It is far from frivolous to suggest that, if the facts upon

134. See notes 119-123 and accompanying text.

135. See Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 Harv. J.L. & Pub. Pol. 495, 495 (1995) ("[T]here is a surprisingly general consensus . . . that originalism simply will not do as an exhaustive or even a privileged theory of constitutional interpretation. It follows, therefore, that originalism sometimes legitimately loses out to other theories as to how to properly give meaning to the complex web of understandings we call the United States Constitution.").

136. Rubenfeld, 107 Yale L.J. at 432 n.25 (cited in note 100) (citing Bork, *Tempting* at 82 (cited in note 34)).

137. Id.

138. See notes 35-38 and accompanying text. I should note that Professor Rubenfeld disclaims originalism as an interpretive tool. Rubenfeld, 107 Yale L.J. at 432 (cited in note 100).

which they made that assessment change, and if the relevant legal standard is as vague as "equal protection of the laws," future courts might justifiably reach different conclusions. More importantly, contrary to Professor Rubenfeld's suggestion, that interpretation is no less "originalist," than the argument that *Brown* was incorrectly decided because the Framers did not specifically believe segregation as it existed at the time violated equal protection. Mark Tushnet made this point fifteen years ago:

> Suppose that we did turn back the clock so that we could talk to the framers of the fourteenth amendment. If we asked them whether the amendment outlawed segregation in public schools, they would answer "No." But we could pursue our conversation by asking them what they had in mind when they thought about public education. We would find out that they had in mind a relatively new and peripheral social institution .... In contrast, they thought that freedom of contract was extremely important because it was the foundation of individual achievement, and they certainly wanted to outlaw racial discrimination with respect to this freedom. Returning to 1954 ... [o]ur hermeneutic enterprise has shown us that public education as it exists today—a central institution for the achievement of individual goals—is in fact the functional equivalent not of public education in 1868, but of freedom of contract in 1868. Thus, *Brown* was correctly decided ....[139]

It may be that judges should not engage in this type of interpretive exercise. Perhaps judges should simply ask whether the Framers considered the specific question of segregated schools and, if they did, and thought them constitutional, judges should defer to those expectations. But, as discussed earlier, the Supreme Court has never consistently engaged in that kind of constitutional interpretation.[140] The question is not simply what the Framers thought about segregated schools, or for that matter, what they thought about frisking suspects who are detained but not formally arrested,[141] but *whether* what they thought about these questions still makes sense in light of changes they could not have anticipated. This is the kind of originalist interpreta-

139. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 800-01 (1983).

140. See note 131.

141. See notes 101-107 and accompanying text.

tion actually practiced by the Supreme Court, because it is the only kind of originalism that makes any sense.[142]

Professor Rubenfeld's recent comments about *Brown* and originalism carry on a forty-three year tradition.[143] Thousands of pages in law reviews and books have been devoted to this subject.[144] The first such article appeared in 1955 and the debate is still raging today.[145] Why? The Supreme Court did not rely on original intent to decide *Brown,* although many scholars, including Ronald Dworkin, Michael McConnell, and Judge Bork, argue it could have done so. Does anybody think the controversy over *Brown* or the history of segregation in this country would have been different had the Court decided the case based on original intent? Would the South have been more receptive to the Court's decision had it been steeped in history instead of policy? Of course not. So why do scholars, both on the left and the right, feel such a strong need to justify *Brown* through originalism, or to justify originalism through *Brown*? Since the Supreme Court decided the case with reference to contemporary notions of racial and social equality, little has been gained by the scholarly attempt to rewrite the decision to do the impossible—to justify (or to criticize) the case based purely on original meaning.

So, what should commentators have said about the *Brown* decision and its relationship to original meaning and history? Lawrence Lessig of the Harvard Law School recently applied his theory of "translation" to this question in a helpful and interesting way.[146] In this article, Lessig did not attempt to justify or

142. See Michael J. Perry, *The Constitution, The Courts, and the Question of Minimalism*, 88 Nw. U. L. Rev. 84, 86-87 (1993).

143. See Alexander M. Bickel, *The Original Understanding and the Segregration Decision*, 69 Harv. L. Rev. 1 (1955).

144. See, e.g., Walter E. Dellinger, III, *School Segregation and Professor Avins' History: A Defense of* Brown v. Board of Education, 38 Miss. L.J. 248 (1967); John P. Frank and Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 Wash. U. L.Q. 421, 456-67; Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 Mich. L. Rev. 1049 (1956); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 252 (1991); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1242-43 (1993); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995); Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 Harv. J.L. & Pub. Pol. 457 (1996); Michael W. McConnell, *The Originalist Justification for* Brown*: A Reply to Professor Klarman*, 81 Va. L. Rev. 1937 (1995).

145. See Bickel, 69 Harv. L. Rev. at 1 (cited in note 143); McConnell, 91 Va. L. Rev. at 1 (cited in note 144).

146. Lawrence Lessig, *Fidelity and Constraint*, 65 Fordham L. Rev. 1365, 1367, 1420-

criticize *Brown* based on what the Framers of the Fourteenth Amendment did or did not believe. Nor did he discuss the legitimacy of various methods of constitutional interpretation. Rather, he tried to describe how the equality principle contained in the Fourteenth Amendment came to mean something different in 1954 than it meant in 1896. In other words, he attempted to understand how a change in the factual context led to a change in a legal decision.

Lessig argued that racism was an important part of American society in the late nineteenth century. Racism was not a choice but was "how people saw the world—how normal people saw the world. To deny or question racism didn't make you curious, or clever. To deny it made you weird."[147] Racism was prevalent within biology, anthropology, psychology, and the social sciences. It was, in short, part of an "overlapping consensus" throughout society.[148]

Over time, as the twentieth century moved forward, the unquestioned assumptions of our racist society slowly started to melt away. "This erosion was felt first within science, where the principles of scientific racism were effectively challenged.... One by one, areas where science proved the inferiority of the black race were areas where this proof was drawn into doubt. The old views were rejected, or at least contested."[149] Moreover, after World War II, our defeat of Hitler and his racism made our own seem all the more hypocritical.[150] When the Court finally faced the *Plessy* issue again, all that supported segregation was "a remote and opportunistic doctrine of stare decisis, tied to the bare claim that the police power has always permitted states to order social spheres according to their perception of morality.... But these justifications were just too thin. However controversial, the command of the Equal Protection Clause demanded an answer."[151] That answer, provided by an unanimous Supreme Court, was that official state-required segregation was inconsistent with the equality principle of the Fourteenth Amendment.

Professor Lessig's project is consistent with Professor Machen's constitutional philosophy. The Fourteenth Amendment

---

24 (1997).

147. Id. at 1421.

148. Id.

149. Id. at 1422.

150. Id.

151. Id. at 1423.

sets forth a principle of equality that does not change over time, but the society to which that principle applies does change. How we feel about butter and margarine might change,[152] and—much more important of course—how we feel about racial discrimination changes. These social debates inevitably influence judicial decisions far more than scholarly interpretations of the constitutional text or the specific intentions of the Framers. Lessig's descriptive account of how the Supreme Court changed its views on the application of the Equal Protection Clause sounds plausible because it is not based on a controversial reading of text and history, but rather on an overarching theory of why the Supreme Court could have believed in 1954 that official racial discrimination had become unequal and unjust under the equality principle of the Fourteenth Amendment.

Lessig's account also recognizes that a proper use of history in constitutional interpretation requires a study, not just of the original meaning of constitutional language, but of how that meaning has been applied over the full course of American history.[153] Interpretations inevitably evolve because judges must apply vague constitutional norms to a society whose institutions and values are constantly changing. This point, which prominent scholars such as Larry Kramer and Barry Friedman are currently making with great force,[154] was also made by Professor Machen almost one hundred years ago when he recognized that constitutional decisions depend as much upon the factual context at the time of the case as the applicable legal principle.[155] Whether this is true because the Framers intended that the vague norms they established must be interpreted over time, as Ronald Dworkin argues, or because the nature of judging does not allow us to be ruled by people who lived centuries ago, does not really matter. What separates us is not the question of the *relevance* of history to constitutional interpretation, but rather what our history, traditions, and reason teach us about fundamental values and which political institutions should define and enforce those values. It is

152. See notes 37-38 and accompanying text.

153. See Larry Kramer, *Fidelity to History-and Through It*, 65 Fordham L. Rev. 1627, 1628 (1997) ("[W]hile I believe that history matters very much in constitutional interpretation . . . the history that matters is not limited to Founding moments but must include subsequent developments as well."). See also Barry Friedman, *The Sedimentary Constitution*, U. Pa. L. Rev. (forthcoming 1999) ("history is essential to interpretation of the Constitution, but the relevant history is not just that of the founding, it is all of American history.").

154. Id.

155. See Machen, 14 Harv. L. Rev. at 273 (cited in note 2).

upon those difficult issues, not the appropriate role of original meaning in constitutional interpretation, that legal scholars and judges should focus their considerable energies.

CONCLUSION

There have been numerous law review articles and books written in the last twenty years devoted to the subject of originalism and constitutional interpretation. This focus on a question largely irrelevant to how the Supreme Court decides cases is truly unfortunate. As Professor Machen told us a long time ago, an ever-changing society governed by a vague foundational document will require judicial decisions that apply new circumstances to old rules. History and custom will be important to that application, but not decisive. Judges do not have to choose between a Living Constitution and the dead hand, but they must inevitably make difficult judgments about competing institutional roles and fundamental rights and liberties. Those are the truly hard questions of constitutional law, and it is time that we face them without the baggage of an old and unhelpful debate about the relationship between original meaning and constitutional interpretation.